

September 4, 1996

## **Advisory Opinion 1996 - No. 11**

The Board has received a request for an advisory opinion from Timothy Martin, Chief Clerk of the House of Representatives. Mr. Martin has waived the right to confidentiality afforded to persons requesting advisory opinions.

### **QUESTION**

May a legislator issue a press release or otherwise respond, using public resources, to statements made by the governor in a press conference or through a press release in which the governor states his or her position on public policy issues in an attempt to influence public debate?

### **OPINION**

The answer is yes, unless the content or context of the release suggests otherwise. The State Ethics Act does not establish a prohibition against legislative statements that respond to statements made by the governor. In determining whether any particular response violates the prohibition on the use of public resources for campaign purposes, this Board will consider the particular circumstances of that response, using a set of factors set forth below.

### **FACTUAL BACKGROUND**

On July 25th, Governor Lowry held a press conference and distributed a press release in which he denounced proposals for across-the-board property tax cuts. The Governor framed his comments in the context of campaigns, criticizing candidates who make such proposals for property tax cuts, stating that such "candidates . . . ought to do a better job of telling voters the whole story," and calling the proposals "fiscally irresponsible campaign promises." Two members of the House of Representatives immediately sought to issue press releases in response to the Governor's statements.

Both houses of the Legislature operate under a set of internal standards for dealing with the use of public facilities. In 1992, both the House and the Senate adopted Standards of Conduct for the Use of Public Facilities. These standards were adopted in order to provide guidance in areas of ambiguity between appropriate legislative activity and prohibited campaign activity and to create a process, beginning on July 1 of election years, in which the Chief Clerk and the Secretary of the Senate would review all press releases, as well as a number of other activities. This process is intended to provide a check on the use of legislative resources during the election season in order to avoid the use of such resources for campaign purposes.

The Chief Clerk was asked, pursuant to the process created by the Standards of Conduct, to approve the two legislative press releases in which the members sought to respond to the Governor's statements. The Chief Clerk asked the two members to withdraw their requests and filed this request for an advisory opinion with this Board.

### **ANALYSIS**

#### A. Press releases generally

The threshold question presented by the opinion request is whether legislators may use public resources to issue press releases at all. The State Ethics Act prohibits legislators from using their positions "to secure special privileges or exemptions" for themselves or others, RCW 42.52.070, and from using public resources "for the private benefit or gain" of themselves or others, RCW 42.52.160(1). Both prohibitions are subject to an exception for the exercise of the legislator's "duties." In Advisory Opinion 1995 - No. 17, the Board examined the scope of a legislator's duty in the context of correspondence. In that opinion, we liberally construed the term "duties" as follows: "Generally, we will interpret the exception for 'duties' broadly to encompass a legislator's discretionary and nondiscretionary authority" (Advisory Opinion 1995 - No. 17, at 3).

Using a similar analysis, the Board finds that the issuance of press releases to inform constituents about legislative matters is well within the traditional understanding of legislative duty. A press release issued only for a private, non-legislative purpose, would not satisfy this test.

#### B. Use of public facilities for campaign purposes

The second issue raised by this opinion request is whether a legislative press release violates the prohibition on the use of public facilities for campaign purposes found at RCW 42.52.180. That prohibition reads as follows:

No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition.

RCW 42.52.180(1). This general prohibition on campaign activities does not apply to "[a]ctivities that are part of the normal and regular conduct of the office or agency." RCW 42.52.180(2)(c).

This Board has not previously had an occasion to interpret whether a legislator's response to the governor's public policy statements presents a violation of the prohibition against the use of public resources for campaign purposes found at RCW 42.52.180. The Board has been asked about the extent to which a legislator may communicate, using public resources, on ballot propositions. In Advisory Opinion 1995 - No. 18, we considered, in part, whether and to what extent such communications would be considered part of the normal and regular conduct of the office. We fashioned somewhat of a definition of normal and regular conduct, and held that such conduct "means activities which are otherwise lawful and customary" (Advisory Opinion 1995 - No. 18, at 3).

This definition of normal and regular conduct seemed to parallel a definition found in an earlier Attorney General's Opinion. In AGO 1975, No. 23, the Attorney General was asked, in part, whether a legislator could inform his constituents, using public resources, of his opinion on a matter that is the subject of a ballot measure. The Attorney General concluded, applying language similar to RCW 42.52.180, that such communications were appropriate and legal.

We find persuasive the language found in the Attorney General's opinion as follows:

. . . we therefore have no hesitation in concluding that it is not only lawful but also "normal and regular conduct" for a legislator to utilize the facilities of his office for the purpose of (a) soliciting the views of his constituents on matters which are

or may be the subject of action in the legislature and (b) informing his constituents on bills or other matters pending, proposed, enacted or defeated in the legislature, including the legislator's own views and/or voting record on such matters. Nor do we mean this to be an exclusive listing of the actions which members of the legislature may take with the resources of their offices - for there may be others. AGO 1975, No. 23, at 10-11.

However, the opinion goes on to state, as the Board has previously noted, that the substance and timing of the communication could render prohibited an otherwise permissible document. See Advisory Opinion 1995 - No. 18.

We find no per se violation of RCW 42.52.180 when a legislator issues a press release or other responsive statement, using public resources, in response to statements made by the governor or any other state-wide elected official in which the state official states his or her position on a matter of public policy. Therefore, we answer the Chief Clerk's question in the affirmative. A legislator may respond to issues raised and statements made by the governor, or any other state-wide elected official, unless such response is determined to be for the purpose of assisting a campaign and is not part of the normal and regular conduct of the office.

In determining whether a particular response goes beyond what is appropriate under the statute, the Board will consider the following five factors: (1) the timeliness of the response, (2) the proximity of the response to an election, (3) the relevance of the response to a legislative issue and to the initial outside statement, (4) the source of the initial outside statement, and (5) the tone and tenor of the response.

#### 1. Timeliness

In order to ensure that a legislative response is sufficiently appropriate, it must be offered reasonably close in time to the initial outside statement to which it responds. Any response that is delayed, and especially one that is delayed to a point near an election date, will be suspect. The further a response is from the initial statement, the less newsworthy it is and the more likely a campaign purpose may be inferred.

#### 2. Proximity to Election

Legislative responses that are made in close proximity to an election may imply that the primary purpose of the communication is to persuade or attempt to persuade persons to vote one way or another. The Board notes with approval that the Senate and the House of Representatives have established a date and procedure for applying closer scrutiny. We do not, however, determine that any date or procedure established by either the House or Senate establishes an absolute point beyond which a responsive press release will automatically be considered a violation of the Act.

#### 3. Relevance

In order to justify an appropriate legislative response, the substance of the initial outside statement must have some relevance to legitimate legislative issues that are either currently pending before the Legislature, have been considered by the Legislature in the past, or could be considered by the Legislature in the future. Furthermore, a responsive statement from a legislator must be relevant to the initial outside statement. If the substance of the responsive legislative statement is not relevant, or is unnecessary for the purpose of responding to the initial statement, the responsive statement would not appear to be permitted under the Act.

#### 4. Source of Initial Statement

The person making the initial statements, as well as his or her position, will be considered as a factor. Certain state-wide elected officials, and especially the governor, carry a much more prominent role in framing public policy than others. The office of governor, in particular, is the single most important state-wide executive position and often plays a leadership role in developing public policy. The question whether legislative responses to statements by other sources, such as lobbyists and citizen groups, are permitted under the State Ethics Act is not addressed by this opinion. Such responses are not necessarily prohibited, but would be subject to very close scrutiny by this Board.

#### 5. Tone and Tenor

The Board is concerned that the language used in a legislator's response to an outside statement is only that language necessary to adequately respond to the substance of the initial statement. Language that is unnecessary in order to accomplish an adequate response will be disfavored by the Board. Spirited debate of legislative-related issues is customary and beneficial, but the tone and tenor of such debate should be respectful and should not impugn the character of a legislative colleague or other elected official.

To the extent that the language used in legislative responses ventures into objectionable tone and tenor, such responses will appear to be less for legitimate legislative purposes and more for personal and campaign purposes. The tone and tenor of a statement, as well as the context, can indicate a purpose of assisting in either an individual campaign or the campaigns of other like-minded legislators. Language in a particular response that is pejorative in its references to other members and groups of members will be scrutinized and given some weight in balance with the other factors. Language that specifically references "candidates" or "campaigns" would almost certainly be considered a violation of the statute.

#### C. Applicability

Finally, we offer three notes on the applicability of this opinion. First, we note that the Ethics Act applies to all members and employees of the Legislature and, therefore, our opinion similarly applies to all members and employees, including members who are not candidates for election or reelection. Second, we have intentionally limited the scope of this opinion to legislative statements that are in response to outside statements. We believe that self-initiated press releases from legislators, using public resources, are very different from responses to outside sources and deserve a higher level of scrutiny. Finally, we remind legislators that they are always free to speak or write on any issues at any time, as long as they do not use public facilities for campaign purposes.